

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MATTHEW KINERSON,

Plaintiff,

VS.

SPOKANE COUNTY, et al.,

Defendants.

NO. 2:14-CV-00216-JLQ

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

BEFORE THE COURT is Plaintiff's Motion for Reconsideration (ECF

No. 59) of the court's Memorandum Opinion and Order (ECF No. 57) which granted Defendant's Motion for Summary Judgment. Plaintiff is represented by Richard Wall. Defendants, represented by Heather Yakely, have filed a Response (ECF No. 60). Plaintiff's Reply brief was due on July 31, 2015, and none was filed. Rather, on July 29, 2015, Plaintiff filed a Notice of Appeal¹ (ECF No. 61).

I. Discussion

Plaintiff brings the Motion pursuant to Fed.R.Civ.P. 59(e) and 60(b) and contends that reconsideration is appropriate because the court committed a clear error of law. (ECF No. 59, p. 2). Rule 59(e) permits a district court to reconsider and amend a previous order, but such is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of*

¹The filing of the Notice of Appeal does not divest the court of jurisdiction. See United Nat. Ins. Co. v. R&D Latex, 242 F.3d 1102, 1109 (9th Cir. 2001) ("The notice of appeal in this case did not, however, divest the district court of jurisdiction at the time it was filed because there was then a pending motion for reconsideration" citing Fed.R.App.P. 4(a)(4)(B)(i)).

1 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion "should not be granted, absent
 2 highly unusual circumstances unless the district court is presented with newly discovered
 3 evidence, committed clear error, or if there is an intervening change in the controlling
 4 law." *Id.* A motion to reconsider may not be used to raise arguments or present evidence
 5 for the first time which could have reasonably been raised earlier. *Id.*

6 Plaintiff does not rely on newly discovered evidence, nor does he argue an
 7 intervening change in the law. Rather, Plaintiff argues that the court committed a clear
 8 error of law in granting summary judgment when there were disputes of fact. Plaintiff
 9 contends that because Defendants had conceded in a reply brief (a concession that
 10 Defendants sought to withdraw at oral argument) that a question of fact existed on the
 11 issue of excessive force, summary judgment was improper. Plaintiff appears to
 12 misapprehend that a dispute of fact concerning use of force does not preclude summary
 13 judgment on the basis of qualified immunity.

14 This court cited to the following language from the Supreme Court's opinion in
 15 *Saucier v. Katz*, 533 U.S. 194, 202 (2001), in its Order granting summary judgment:

16 The approach the Court of Appeals adopted--to deny summary judgment any time
 17 a material issue of fact remains on the excessive force claim--could undermine the
 18 goal of qualified immunity to avoid "excessive disruption of government and
 19 permit the resolution of many insubstantial claims on summary judgment." If the
 20 law did not put the officer on notice that his conduct would be clearly unlawful,
 21 summary judgment based on qualified immunity is appropriate. (ECF No. 57, p. 8-
 22 9).

23 The court additionally cited to *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010) and
 24 *LAL v. California*, 746 F.3d 1112 (9th Cir. 2014) as additional cases in which there were
 25 disputes of fact, yet summary judgment was granted on the basis of qualified immunity.
 26 The principal argument advanced in Plaintiff's Motion--that the concession concerning a
 27 dispute of fact precludes summary judgment on the basis of qualified immunity--is
 28 erroneous.

29 Plaintiff's Motion hyperbolically accuses the court of "making up facts" and
 30 "paying lip service" to the appropriate standard of review. (ECF No. 59, p. 5-6). Plaintiff
 31 states that the court ignored that the Computer Aided Dispatch ("CAD") report stated that

1 Plaintiff had a "bad right arm". The court's Opinion stated that the Deputies were
2 informed that Plaintiff had a medical problem involving nerve pain, but did not have the
3 specifics. That Plaintiff had a "bad" arm is not a specific, nor is it particularly germane to
4 the analysis. An individual armed with deadly weapons (both a gun and a knife), and one
5 "bad" arm can still be a threat to the officers. As this court stated in its Opinion:
6 "Accepting for purposes of this Motion that the officers were informed, or recognized, a
7 disability affecting one arm, that does not mean Kinerson was not a threat." (ECF No. 57,
8 p. 13).

9 Plaintiff also states that the court misconstrued the record by stating the gun was
10 found on the front seat of the car rather than in a backpack in the backseat. Plaintiff
11 claims the "undisputed fact is that the gun was in Mr. Kinerson's backpack in the back
12 seat of his vehicle". (ECF No. 59, p. 7). The court's Opinion cites Plaintiff's own
13 testimony that when he was told to drop the gun he told officers he did not have a gun.
14 (ECF No. 57, p. 4). There is no evidence that prior to the use of force he told the officers
15 his gun was in a backpack in the backseat. There is minor inconsistency in the record as
16 to exactly where the gun was located. Deputy Jones' report states that Thurman found it
17 in a holster behind the front passenger seat. Deputy Thurman's report does not mention
18 it. Corporal Elliott's report states that after Kinerson was detained, he told the officers the
19 gun was in the "driver's seat area" of the vehicle. Kinerson's Declaration states that he
20 packed the gun in a backpack and placed it in the backseat when he left his parent's home.
21 It does not address where the gun was when the officers arrived. Regardless, this is not a
22 question of fact that precludes summary judgment. It is undisputed that the gun was
23 somewhere within the passenger compartment of the car, that the officers had been told
24 that Kinerson was armed with a firearm, and that rather than telling the officers where the
25 gun was (prior to the use of force), Kinerson denied having a gun.

26 The Motion further argues that the court "blatantly misstates the record" by stating
27 that "**at the moment**" Kinerson reached for his waist with his left arm he was shot with
28 the TASER. That testimony comes from Kinerson's own Declaration, at paragraph 10,

1 where he states, "I reached down with my left hand and pulled the front of my t-shirt over
 2 my head...**at that moment**, I was shot in the chest with the TASER." (ECF No. 22).
 3 Whether the TASER was shot at the moment his hand reached his waist, or less than one
 4 second later as he lifted his shirt up is immaterial. It is well-recognized by the courts that
 5 officers are often called upon to make "split-second" decisions and that such decisions,
 6 when challenged, must be judged from the circumstances then existing, rather than from
 7 the basis of hind-sight. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

8 Plaintiff's Motion also devotes several pages to arguing a theory that was first
 9 raised at oral argument--that the officers "rushed in" and could have avoided the use of
 10 force by "taking just a few moments" to further investigate. (ECF No. 59, p. 10-12).
 11 Plaintiff states they should have done more to determine why he was not complying with
 12 the officers' commands. Not only was this theory not pled, or raised in the briefing, but it
 13 is foreclosed by Ninth Circuit precedent. In *Billington v. Smith*, 292 F.3d 1177, 1188
 14 (9th Cir. 2002), the court stated:

15 In *Scott v. Henrich*, we held that even though the officers might have had less
 16 intrusive alternatives available to them, and perhaps under departmental guidelines
 17 should have developed a tactical plan instead of attempting an immediate seizure,
 18 police officers need not avail themselves of the least intrusive means of responding
 19 and need only act within that range of conduct we identify as reasonable. We
 20 reinforced this point in *Reynolds v. County of San Diego*, which distinguished
 21 *Alexander* because the court must allow for the fact that officers are forced to make
 22 split second decisions. We affirmed summary judgment for the defendant police
 23 officers despite experts' reports stating--like the expert report in the case at bar--
 24 that the officers should have called and waited for backup, rather than taking
 25 immediate action that lead to deadly combat.

26 The *Billington* court concluded that a plaintiff could not avoid summary judgment by
 27 "simply producing an expert's report that an officer's conduct leading up to a deadly
 28 confrontation was imprudent, inappropriate, or even reckless." *Id.* at 1189; see also
George v. Morris, 736 F.3d 829, 839 n. 14 (9th Cir. 2013) ("a plaintiff cannot establish a
 Fourth Amendment violation based merely on bad tactics that result in a deadly
 confrontation that could have been avoided"). Here, Kinerson did not offer an expert
 opinion, but rather counsel only belatedly raised the argument in response to Defendants'
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1 Motion for Summary Judgment.

2 Lastly, Plaintiff devotes the last two-pages of his Motion to arguing that "the court
3 erred by striking" the declarations of Julie Eddy and Tim Donahue. Plaintiff is incorrect.
4 The court **did not** strike the declarations. Page 18 of the Court's Opinion states:
5 "Defendants' Motion to Strike (ECF No. 34) is **DENIED**." (ECF No. 57, p. 18)(emphasis
6 in original). The court did point out that Plaintiff had failed to respond to the Motion to
7 Strike, and that there appeared to be merit in Defendants' argument. However, the court
8 clearly stated: "[I]n the interest of a fair determination of all evidence available to the
9 Plaintiff, the court has exercised its discretion and **DENIES** the Motion to Strike." (ECF
10 No. 57, p. 6)(emphasis in original).

11 **II. Conclusion**

12 Plaintiff's Motion does not demonstrate a clear error of law. For the aforesaid
13 reasons, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Reconsideration (ECF
14 No. 59) is **DENIED**.

15 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
16 furnish copies to counsel.

17 **DATED** this 6th day of August, 2015.

18 s/ Justin L. Quackenbush
19 JUSTIN L. QUACKENBUSH
20 SENIOR UNITED STATES DISTRICT JUDGE
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